188 (3)

No. 10-1174

MAY 13 2011

In The
Supreme Court of the United States

VERONICA ALVAREZ,

Petitioner,

v.

DES MOINES BOLT SUPPLY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. ALVAREZ SEEKS REVIEW OF THE EIGHTH CIRCUIT'S DECISION ONLY AS TO THE ISSUE STATED BECAUSE ALVAREZ' REMAINING CLAIMS WERE FACT-SPECIFIC AND DID NOT IMPLICATE A CIRCUIT CONFLICT 1

II. REVIEW OF THE EIGHTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE A CONFLICT IN THE CIRCUITS AS TO AN EMPLOYER'S DUTY TO PREVENT AND CORRECT HARASSMENT IN THE WORKPLACE 2

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Adler v. Walmart Stores, Inc., 144 F.3d 664 (10th Cir. 1998) 3

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998) 7

Cerros v. Steel Technologies, Inc., 398 F.3d 944 (7th Cir. 2005) 6

E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989) 3, 6

Estate of Shedd v. Commissioner, 237 F.2d 345 (9th Cir. 1956) 4

Faragher v. Boca Raton, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998) 3, 7

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) 2

Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027 (7th Cir. 1998) 3

RULES

Supreme Court Rule 14(g) 1

I. ALVAREZ SEEKS REVIEW OF THE EIGHTH CIRCUIT'S DECISION ONLY AS TO THE ISSUE STATED BECAUSE ALVAREZ' REMAINING CLAIMS WERE FACT-SPECIFIC AND DID NOT IMPLICATE A CIRCUIT CONFLICT.

In its opposition, Respondent Des Moines Bolt Supply, Inc. ("DMB") alleges Petitioner Veronica Alvarez ("Alvarez") misrepresented the record below and was "less than candid" in describing it. In accordance with Supreme Court Rule 14(g), Alvarez' Petition included a concise statement of the case setting out the facts material to the consideration of the question presented. Alvarez' brief factual summary was not intended to mislead the Court, but to comply with the Court's rules. Facts regarding those claims not presented for appeal are clearly set forth in the Eighth Circuit's opinion, which is included in Alvarez' Petition, pp. 1a-27a, and the District Court's opinion, found at pp. 28a-64a.

DMB also characterizes Alvarez' decision not to petition the Court for review of all of her claims against DMB as an admission as to the weakness of her position. Alvarez has not petitioned the Court for review of additional claims which the Eighth Circuit decided in DMB's favor because those claims were fact-based and did not implicate a circuit conflict. As such, they were inappropriate for review by this Court.

Finally, DMB's factual summary differs from that set forth in the Eighth Circuit's opinion, which was

charged with construing disputed facts in Alvarez' favor. For purposes of this appeal, Alvarez urges the Court to consider the Eighth Circuit's factual summary of the case as representative of the record, rather than the factual arguments submitted by DMB.[1]

II. REVIEW OF THE EIGHTH CIRCUIT'S DECISION IS NECESSARY TO RESOLVE A CONFLICT IN THE CIRCUITS AS TO AN EMPLOYER'S DUTY TO PREVENT AND CORRECT HARASSMENT IN THE WORKPLACE.

In her Petition for a Writ of Certiorari, Alvarez asked this Court to review the Eighth Circuit's decision that an employer has no duty to prevent coworker harassment from creating an unlawful hostile work environment. In requesting review, Alvarez argued that review is warranted because the Eighth Circuit decision conflicts with decisions in other circuits which impose a duty to discover, rectify and prevent a hostile work environment. This duty is consistent with the objective set forth in *Meritor Savings Bank, FSB v. Vinson,* 477 U.S. 57, 106 S. Ct.

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[1] For example, DMB argues that Ms. Alvarez made only two complaints of harassment before the conduct became actionable. That interpretation ignores the complaint she made to Sharon Miller, the human resources representative, which Ms. Miller acknowledged. DMB also ignores the fact that even after the third complaint, DMB did nothing to effectively stop the harassment.

2399, 91 L. Ed. 2d 49 (1986) to eliminate all harassment in the workplace.

In essence, the conflict centers on whether an employer is liable only for failure to *remedy* co-worker sexual harassment that has already reached the actionable level – as the Eighth Circuit held – or whether an employer can also be liable for failing to take active steps to *discover* and *prevent* co-worker sexual harassment, as in the Seventh, Ninth, and Tenth Circuits. *See, e.g., Parkins v. Civil Constructors of Illinois, Inc.,* 163 F.3d 1027, 1035 (7th Cir. 1998); *E.E.O.C. v. Hacienda Hotel,* 881 F.2d 1504, 1515-16 (9th Cir. 1989); and *Adler v. Walmart Stores, Inc.,* 144 F.3d 664, 673 (10th Cir. 1998).

DMB ignores the essential differences among the circuits in evaluating the employer's duty. DMB first implies that this Court's decision in *Faragher v. Boca Raton,* 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998) recognized a uniform circuit court standard for judging an employer's liability for co-worker harassment. While the *Faragher* decision noted that the circuit courts uniformly recognize a "negligence standard" for imposing employer liability for co-worker harassment, it did not describe any uniformity among the circuits regarding the employer's duty. Furthermore, as the *Faragher* decision only involved the employer's liability for a supervisor's conduct, it did not articulate the duty of an employer on the issue of co-worker liability. While the circuits each apply some sort of negligence standard regarding co-worker

harassment, they vary widely in the specific conduct (or lack thereof) that will result in employer liability.

DMB minimizes the circuit conflict as a mere "exercise in semantics." The Ninth Circuit responded to a similar complaint as follows:

> It might be answered that all legal disputation is, in the final analysis, "an exercise in semantics." Since man has not yet evolved into a telepathic being, he must resort to language in order to express his thoughts and desires . . . The law is shot through with semantic distinctions: Assault versus battery; flotsam versus jetsam; law versus equity; tort versus contract. . . .

Estate of Shedd v. Commissioner, 237 F.2d 345, 346 (9th Cir. 1956).

The differences in the employer liability standards among the circuits must be considered to have meaning with actual consequences. Consider the scenario at issue under the various circuit standards:

Alvarez complained to her human resources representative, "Brad made a comment about my breasts." The human resources representative did nothing. Alvarez then complained to her supervisor, "Brad is making sexually harassing comments to me." The supervisor responded, "I will tell him to stop." Weeks later, she complained again, "Brad is making sexual comments to me." Her supervisor again merely said, "I will tell him to stop." The harassment continued and worsened until it became legally "actionable"

over the course of several months.[2] DMB ultimately investigated and took remedial action upon Alvarez' fifth complaint when a new supervisor asked her to put her complaint in writing.

The Eighth Circuit imposes liability on employers only for failure to remedy conduct of which it "knows or should have known," not for failure to prevent. In *Alvarez,* the Eighth Circuit ruled that "because the episodes of misconduct *of which DMB had notice* [through her first three complaints] prior to January 10 did not create a hostile environment, the company is not liable under Title VII regardless of whether DMB took prompt remedial action after Alvarez' initial complaints." (See Opinion, Petition p. 19a) (emphasis added). In the Eighth Circuit, the employer is under *no duty to inquire further* into the nature of the comments made, whether the comments were accompanied by gestures, threats, or physical contact. In fact, there is an incentive not to inquire further. If the employer has no notice of the severity of the harassment, it cannot be liable for failing to remedy it.

To avoid liability in the Seventh Circuit, an employer must "*take reasonable steps to discover* and

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[2] The District Court held that "[a] reasonable jury could conclude that the harassment Alvarez suffered was adequately intimidating and invasive that it rose to the level of creating a hostile work environment." (District Court opinion, Petition pp. 52a-53a). As such, DMB's assertion that she did not establish that she suffered actionable harassment is wrong.

rectify" acts of harassment. *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 952 (7th Cir. 2005) (emphasis added). This duty to "take reasonable steps to discover" is not present in the Eighth Circuit standard. This is not a matter of "semantics" alone; it is a substantial difference in the duties imposed on the employer. Employers with a duty to take active steps to discover the extent of harassment must ask the complainant for details about the harassment, and then take action to remedy it. They may not simply stand by passively and remain ignorant of the details, as in the Eighth Circuit.

DMB's argument that the circuits are in agreement in that an employer is not required to take any action to stop or prevent harassment until it passively is "made aware" of "actionable harassment" is misplaced. The Seventh Circuit's requirement that employers take on an *active* role "to take reasonable steps to discover" acts of sexual harassment (*Cerros*, 398 F.3d at 952) is not the same as the *passive* role ("become aware of") DMB suggests. It is not simply "phrased slightly differently"; it is the opposite.

DMB also ignores the fact that the Eighth Circuit does not impose a duty to "prevent" a hostile or offensive work environment, while the duty to "prevent" is explicit in the Ninth and Tenth Circuits. *See E.E.O.C. v. Hacienda Hotel*, 881 F.2d at 1515-16 and *Adler*, 144 F.3d at 673. The Ninth and Tenth Circuits' approach in requiring employers to prevent a hostile or offensive work environment from developing fulfills Title VII's "affirmative obligation to prevent"

sexual harassment in the workplace, as stated in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 141 L. Ed. 2d 663, 118 S. Ct. 2257 (1998) and *Faragher,* 524 U.S. 775.

The "hypothetical situations" DMB presents in its opposition are easily remedied with the Seventh, Ninth and Tenth Circuits' uniform duty to discover and prevent actionable harassment. If a female employee complains to her supervisor that a male co-worker "winked" at her, blew her a kiss, or made a sexual comment to her, the proper response would be to inquire as to whether any additional harassing conduct was occurring. Perhaps the woman nervously mentioned the wink/blown kiss/comment first to open a dialogue with the supervisor. A properly trained supervisor in the Seventh, Ninth or Tenth Circuit would confidentially question her further: Has he touched you? What comments has he made to you? What were those comments? How frequently has he done this? What else, if anything, has he done that made you uncomfortable? The supervisor would thus be fulfilling his duty to *discover* harassment that may rise to the level where remedial action was required. The information gleaned from the interview may show that a serious problem was developing that should be addressed immediately. If the conduct in fact consisted of simply one wink, a brief reprimand to the offending winker would be appropriate. This duty to *discover* the extent of the harassment fulfills the purposes of Title VII in a way that the Eighth Circuit's "do nothing and remain ignorant" cannot.

It is the Eighth Circuit's standard that makes DMB's hypothetical situations more difficult. If an employer's duty to respond does not begin until the harassment becomes "actionable," how can the employer say with any certainty when the "actionable" point begins? Courts across the nation struggle with this very issue.

Additional differences are set forth in Alvarez' Petition and need not be repeated here. Had Alvarez been in the Seventh, Ninth or Tenth Circuit, DMB would have discovered the true frequency and severity of the sexual remarks, propositions, and physical contact she suffered with her *first* complaint, and the developing hostile work environment may have been prevented. The "potential time bomb for employers" DMB warns of is nothing more than the opportunity for millions of employees to work in a harassment-free environment. Such is the purpose of Title VII.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Alvarez respectfully submits that her Petition for a Writ of Certiorari should be granted. Alvarez also submits that reversal of the Eighth Circuit's decision is appropriate in this case.

Respectfully submitted,

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